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HOUSE BILL 192

48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007

INTRODUCED BY

Gail Chasey

FOR THE COURTS, CORRECTIONS AND JUSTICE COMMITTEE

AN ACT

RELATING TO MEDIATION; ENACTING THE MEDIATION PROCEDURES ACT;
ESTABLISHING CONFIDENTIALITY FOR MEDIATION COMMUNICATIONS;
PROVIDING EXCEPTIONS FOR DISCLOSURE OF MEDIATION
COMMUNICATIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Mediation Procedures Act".

Section 2. DEFINITIONS.--As used in the Mediation
Procedures Act:

A. "mediation" means a process in which a mediator:

(1) facilitates communication and negotiation
between mediation parties to assist them in reaching an
agreement regarding their dispute; or

(2) promotes reconciliation, settlement or

1 understanding between and among parties;

2 B. "mediation communication" means a statement,
3 whether oral or in a record or verbal or nonverbal, that occurs
4 during a mediation or is made for purposes of considering,
5 conducting, participating in, initiating, continuing or
6 reconvening a mediation or retaining a mediator;

7 C. "mediation party" means a person who
8 participates in a mediation and whose agreement is necessary to
9 resolve the dispute;

10 D. "mediation program" means a program that
11 provides mediation services and is created or administered by a
12 court or court agency, a government or governmental
13 subdivision, agency or instrumentality of this state or a
14 tribal court, government or agency;

15 E. "mediator" means an individual who:

16 (1) holds the individual's self out as a
17 mediator and who conducts a mediation;

18 (2) the mediation parties agree to use as a
19 mediator and who conducts a mediation;

20 (3) is designated by a mediation program as a
21 mediator and who conducts a mediation; or

22 (4) is an observer who is permitted by the
23 mediation parties to watch and listen to the mediation for
24 educational or other administrative purposes;

25 F. "nonparty participant" means a person, other

1 than a mediation party or mediator, who participates in, is
2 present during the mediation or is a mediation program
3 administrator, including a person consulted by a mediation
4 party to assist the mediation party with evaluating,
5 considering or generating offers of settlement;

6 G. "person" means an individual, corporation,
7 business trust, estate, trust, partnership, limited liability
8 company, association, joint venture, government or governmental
9 subdivision, agency or instrumentality, public corporation or
10 any other legal or commercial entity;

11 H. "proceeding" means:

12 (1) arbitration or a judicial, administrative
13 or other adjudicative process, including related pre-hearing
14 and post-hearing motions, conferences and discovery; or

15 (2) a legislative hearing or similar process;

16 I. "record" means information that is inscribed on
17 a tangible medium or that is stored in an electronic or other
18 medium and is retrievable in perceivable form; and

19 J. "sign" means:

20 (1) to execute or adopt a tangible symbol with
21 the present intent to authenticate a record or to ratify the
22 agreement set forth in the record; or

23 (2) to attach or logically associate an
24 electronic symbol, sound or process to or with a record with
25 the present intent to authenticate a record or to ratify the

1 agreement set forth in the record.

2 Section 3. SCOPE.--

3 A. Except as otherwise provided in Subsection B of
4 this section, the Mediation Procedures Act applies to all
5 mediators, nonparty participants, mediation parties and a
6 mediation in which:

7 (1) the mediation parties are required to
8 mediate by statute or court or administrative agency rule or
9 are referred to mediation by a court, administrative agency or
10 arbitrator; or

11 (2) the mediation parties and the mediator
12 agree to mediate and the agreement to mediate is evidenced by a
13 record that is signed by the mediation parties.

14 B. The Mediation Procedures Act does not apply to a
15 mediation:

16 (1) relating to the establishment,
17 negotiation, administration or termination of a collective
18 bargaining relationship;

19 (2) relating to a dispute that is pending
20 pursuant to or is part of the processes established by a
21 collective bargaining agreement, except that the Mediation
22 Procedures Act applies to a mediation arising out of a dispute
23 that has been filed with an administrative agency or court;

24 (3) conducted by a judge who might make a
25 ruling on the case; or

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1 (4) agreed to in writing by the mediation
2 parties and the mediator prior to the mediation not to be
3 covered by the Mediation Procedures Act, declared in writing by
4 a mediation program prior to the mediation or declared in
5 writing by a court or court agency, a government or
6 governmental subdivision, agency or instrumentality of this
7 state or a tribal court, government or agency prior to the
8 mediation not to be covered by the Mediation Procedures Act.

9 Section 4. CONFIDENTIALITY.--Except as otherwise provided
10 in the Mediation Procedures Act or by applicable judicial court
11 rules, all mediation communications are confidential, and not
12 subject to disclosure and shall not be used as evidence in any
13 proceeding.

14 Section 5. EXCEPTIONS--ADMISSIBILITY--DISCOVERY.--

15 A. Mediation communications are not confidential
16 pursuant to the Mediation Procedures Act if they:

17 (1) are contained in an agreement reached by
18 the mediation parties during a mediation, including an
19 agreement to mediate, and the agreement is evidenced by a
20 record signed by the mediation parties, except when parts of
21 the agreement are designated by the mediation parties to be
22 confidential or are confidential as otherwise provided by law;

23 (2) are communications that all mediation
24 parties agree may be disclosed, as evidenced by a record signed
25 by all mediation parties prior to or at the mediation;

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underscoring material = new
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1 (3) threaten or lead to actual violence in the
2 mediation;

3 (4) reveal the intent of a mediation party to
4 commit a felony or inflict bodily harm to the mediation party's
5 self or another person;

6 (5) disprove a felony charge;

7 (6) are required by law to be made public or
8 otherwise disclosed;

9 (7) relate to abuse, neglect or criminal
10 activity that is not the subject of the mediation;

11 (8) are sought or offered to disprove a claim
12 or complaint of professional misconduct or malpractice based on
13 conduct during a mediation and filed against a mediation party
14 or nonparty participant; or

15 (9) relate to the administrative facts of the
16 mediation, including:

17 (a) whether the mediation parties were
18 referred to mediation;

19 (b) whether a mediation occurred or has
20 terminated;

21 (c) the date, time and place of a
22 mediation;

23 (d) the persons in attendance at a
24 mediation;

25 (e) whether a mediator received payment

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1 for the mediation; and

2 (f) whether the mediation parties
3 reached a settlement in the mediation.

4 B. Mediation communications may be disclosed if a
5 court, after hearing in camera and for good cause shown, orders
6 disclosure of evidence that is sought to be offered and is not
7 otherwise available in an action on an agreement arising out of
8 a mediation evidenced by a record. Nothing in this subsection
9 shall require disclosure by a mediator of any matter related to
10 mediation communications.

11 C. Mediators shall not be required to make
12 disclosure, either through discovery or testimony at trial or
13 otherwise, of any matter related to mediation communications,
14 except:

15 (1) pursuant to Paragraphs (3) through (9) of
16 Subsection A and Paragraph (3) of Subsection D of this section;
17 and

18 (2) to prove or disprove a claim of mediator
19 misconduct or malpractice filed against a mediator.

20 D. Nothing in the Mediation Procedures Act shall
21 prevent:

22 (1) the discovery or admissibility of any
23 evidence that is otherwise discoverable or admissible, merely
24 because the evidence was presented during a mediation;

25 (2) the gathering of information for research

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1 or educational purposes or for the purpose of evaluating or
2 monitoring the performance of a mediator; provided that the
3 mediation parties or the specific circumstances of the dispute
4 of the mediation parties are not identified or identifiable;

5 (3) a court or court agency, a government or
6 governmental subdivision, agency or instrumentality of this
7 state or a tribal court, government or agency, when conducting
8 a mediation program under its auspices, from ordering prior to
9 the mediation that different or additional rules of
10 confidentiality shall apply to the mediation; or

11 (4) mediation parties from agreeing in writing
12 to additional or different confidentiality protections prior to
13 the mediation, subject to Paragraphs (3) through (9) of
14 Subsection A and Subsection C of this section.

15 Section 6. EFFECT OF AGREEMENT.--

16 A. If the mediation parties reach a settlement
17 agreement evidenced by a record signed by the mediation
18 parties, the agreement is enforceable in the same manner as any
19 other written contract. The agreement shall not affect any
20 outstanding court order unless the terms of the agreement are
21 incorporated into a subsequent order.

22 B. A court, administrative agency or arbitrator, in
23 its discretion, may incorporate the terms of the agreement in
24 the order or other document disposing of the matter.

25 Section 7. EFFECTIVE DATE.--The effective date of the

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1 provisions of this act is July 1, 2007.

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